Supreme Court, U.S.
FILED
MAR 3 1993
OFFICE OF THE CLERK

No. 92-1342

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
vs.
ROBERT PAUL WILSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to consider overruling the settled rule that the Sixth Amendment renders inadmissible in the prosecution's case-in-chief incriminating statements deliberately elicited from a represented defendant in the absence of counsel after formal criminal proceedings have begun, without an express waiver of the right to counsel. *Michigan v. Harvey*, 494 U.S. 344 (1990); *Maine v. Moulton*, 474 U.S. 159 (1985); *United States v. Henry*, 447 U.S. 264 (1980); *Brewer v. Williams*, 430 U.S. 387 (1977); *Massiah v. United States*, 377 U.S. 201 (1964).

2. Whether this Court should grant certiorari to review the unanimous decision of the California Supreme Court that trial counsel's failure to object to the admissibility of incriminating statements obtained by an undercover government agent in flagrant violation of respondent's Sixth Amendment right to counsel was prejudicial, where the only other evidence against respondent was weak circumstantial evidence and the testimony of a convicted felon acting as a jailhouse informant, and where the prosecution itself argued that the inadmissible statements were the most important evidence against respondent.

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Respondent Robert Paul Wilson respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, the People of the State of California. Respondent prays that the Writ of Certiorari to reveiw the decision of the California Supreme Court entered on November 12, 1992, be denied.

STATEMENT OF THE CASE

A. The Prosecution's Unconstitutional Eliciting of Incriminating Statements from Respondent.

On January 23, 1985, respondent was formally charged with two counts of murder, robbery and a special circumstance that the murder was committed during the commission of a robbery under California Penal Code Section 190.2(a)(17). In 1987, while respondent was incarcerated at the Los Angeles County Jail and while he was represented by appointed counsel, the district

attorney in charge of respondent's prosecution arranged for an undercover district attorney's investigator, working in collaboration with a career jailhouse informant, to tape two telephone conversations with respondent in the absence of his counsel. In those conversations, the district attorney's investigator posed as a Mafia assassin and deliberately elicited from respondent incriminating statements with respect to the possible elimination of a witness against respondent. During these taped conversations, all of the discussion concerning what would happen to the witness was deliberately initiated by the district attorney's investigator, who asked respondent, "what do you want done with this guy?", "what do you mean, he doesn't need to be there?", "can this guy hurt you or what?" and "what did you want done with this guy? I mean, do you want us — do you want us to scare him or what?" (Supplemental Clerk Transcript ("S.C.T.") 6-8). These conversations were set up and taped by the prosecution explicitly as part of the investigation of the already pending murder case against respondent. Petitioner, who suffers from organic brain impairments and has a history of psychiatric hospitalizations dating from his early teenage years, was led by the prosecution's agents to believe that he could obtain the services of the purported Mafia assassin on "credit."

B. Trial Counsel's Failure to Object to Admission of the Tape Recordings.

At the guilt phase of respondent's trial, in May 1988, the tape recordings of these conversations and the testimony of the district attorney's investigator concerning them were admitted as evidence of consciousness of guilt, without any objection by respondent's court-appointed trial counsel. At the time, this Court had held in *Maine v. Moulton*, 474 U.S. 159 (1985) that "incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, not withstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel." *Id.*, 474 U.S. at 179-80. In *Beatty v. United States*, 389 U.S. 45 (1967), *summarily reversing* 377 F.2d 181 (5th Cir. 1967), this Court had summarily reversed a conviction on Sixth Amendment grounds

under circumstances virtually indistinguishable from those in respondent's case. Several other courts had held that a defendant's Sixth Amendment rights were violated under virtually identical circumstances, *Mealer v. Jones*, 741 F.2d 1451 (2nd Cir. 1984), *cert. denied*, 471 U.S. 1006 (1985); *People v. Bongarzone*, 116 A.D.2d 164, 500 N.Y.S.2d 532 (1986); *United States v. Sweiss*, No. 85 CR 518 (N.D. Ill. 1986), and there was (and remains) no contrary post-*Moulton* authority. Trial counsel was either ignorant of the law, totally misunderstood the law, or unreasonably and incompetently failed to raise a meritorious objection of which he was aware.

The prosecutor himself acknowledged that the inadmissible tape recordings and the testimony of the district attorney's investigator were the most important evidence presented against respondent. In closing argument, the prosecutor stated that "[b]ecause this last aspect [the tape recordings] is so important, I've set it apart and separate [on his chart] from the circumstantial evidence listed above." (Reporter's Transcript ("R.T.") 1053.) The only other evidence linking respondent to the crime was (1) the testimony of a jailhouse informant who claimed that respondent had made incriminating statements to him, but who had received undisclosed benefits from the prosecution in exchange for his testimony; (2) the testimony of a witness who, although he had previously selected respondent's photograph as depicting a man who had been with the victim on the day before the murder, at trial identified someone else in the courtroom as being that man; (3) testimony that respondent allegedly made a remark ten days before the murder that he once had been "tempted" to kill the victim and take his money; and (4) evidence that respondent's shirt was found in the victim's van and that respondent's fingerprints were on the van — evidence that was entirely consistent with the undisputed testimony that respondent had travelled frequently with the victim as his employee prior to the murder.

C. Respondent's Appeal and Petition for Writ of Habeas Corpus.

Respondent filed his automatic appeal from his conviction and death sentence on July 19, 1991. On appeal, respondent argued that he had been deprived of his Sixth Amendment right to counsel by the admission of the tape recordings. Respondent also argued that he had been deprived of his Sixth Amendment right to the effective assistance of counsel, both by trial counsel's failure to object to the tape recordings and by trial counsel's many other errors and omissions.

Respondent filed a petition for a writ of habeas corpus with the California Supreme Court on July 13, 1992. On August 12, 1992, the California Supreme Court issued an Order to Show Cause, and the State filed its Return on August 28, 1992. On September 11, 1992, respondent filed his Traverse in support of the habeas petition.

In his petition and traverse, respondent again argued that he was deprived of effective assistance of counsel by trial counsel's failure to object to the tape recordings, and showed that trial counsel had no tactical reason whatsoever for his failure to object. In addition, respondent demonstrated that he was deprived of due process because the prosecution had failed to disclose material evidence bearing on the credibility of the two jailhouse informants who testified against respondent, and that the prosecution had failed to correct false testimony given by those witnesses. Among other things, respondent presented evidence that, one week after the conclusion of respondent's trial, one of the jailhouse informants received an illegal sentence reduction at a secret, in camera hearing at which the prosecutor in respondent's case requested the illegal sentence reduction "in consideration for the assistance that Mr. Grundy has rendered to the People . . . in this case." Respondent further presented evidence that the jailhouse informant who testified that respondent had purportedly made incriminating statements to him had fabricated his testimony. In addition, respondent presented evidence that both jailhouse informants had testified falsely concerning the benefits they had received for their testimony, their criminal records, and their

histories as government informants, and that the prosecution had failed to correct this testimony.

Respondent further demonstrated in his habeas petition that he was deprived of effective assistance of counsel by trial counsel's failure competently to investigate and present evidence showing that persons other than respondent committed the crimes with which respondent was charged. Among other things, respondent presented a declaration from a witness indicating that a third party, Richard Wayne Anderson, had been with the victim at the time he was murdered, had suddenly and unexplainedly been in possession of a substantial amount of cash immediately after the murder, had fled from the police on at least two occasions shortly after the murder, and had subsequently used a gun of the same caliber used in this murder to shoot another individual. This evidence corroborated the apparent suspicions of the police, who had spent 40-60 hours unsuccessfully searching for Anderson prior to respondent's trial.

D. The Unanimous Decision of the California Supreme Court.

On November 12, 1992, the California Supreme Court filed its unanimous opinions in respondent's appeal and habeas proceeding. In the habeas proceeding, the Court held that trial counsel's failure to seek exclusion of the "highly incriminating testimony [of the district attorney's investigator] and tape recordings" constituted "deficient performance, i.e., representation which falls below the standard of competence demanded of criminal defense attorneys." *In re Wilson*, 3 Cal. 4th 945, 955-56, 13 Cal. Rptr. 269 (1992). The Court further held that trial counsel's failing was prejudicial. The Court emphasized that "[n]othing in the prosecution's case directly linked petitioner to the crimes" and that the testimony of both jailhouse informants "did not go unimpeached." *Id.* at 956-57. In addition, the Court stressed that "evidence was received which tended to link parties other than petitioner to the commission of the crimes." *Id.* at 957. By contrast, the Court held that the testimony of the district attorney's investigator and the tape recordings "were highly incriminating, undoubtedly comprising the strongest evidence against petitioner." *Id.* The Court therefore concluded that "there is a

reasonable probability, i.e., a probability sufficient to undermine confidence in the outcome of petitioner's trial, that the result would have been different but for counsel's deficient performance." *Id.* at 958.

Accordingly, the California Supreme Court unanimously granted the petition for writ of habeas corpus and vacated the judgment against respondent in its entirety. The Court held that respondent's appeal was moot and dismissed it.[1]

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD NOT BE GRANTED TO CONSIDER OVERRULING *MASSIAH V. UNITED STATES* AND *MAINE V. MOULTON.*

This Court decided *Massiah v. United States* more than twenty-eight (28) years ago, in 1964. During those years, this Court has cited *Massiah* with approval on at least seventeen (17) occasions, most recently in *Michigan v. Harvey*, 494 U.S. at 344, 348 (1990) (Rehnquist, C.J.). During those same years, *Massiah* has been cited more than *2,300* times by lower federal courts and state courts.

Maine v. Moulton was decided by this Court eight years ago, in 1985, and has been cited with approval by the Court on at least eight occasions. Since *Moulton* was decided, it has been cited on *450* occasions by lower federal courts and state courts.

In the face of this history, petitioner asks this Court to consider overruling *Massiah* and *Moulton* based on the totally unsupported assertion that the rule of those decisions "does not fall within the protection contemplated by the drafters of the Sixth Amendment

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[1]The California Supreme Court did not reach the numerous other bases upon which respondent argued he had been deprived of effective assistance of counsel, and the Court did not reach respondent's contention that he had been deprived of due process by the misconduct of the prosecution.

right to counsel." Petitioner presents no evidence or argument concerning the intent of the drafters of the Sixth Amendment.

Nor does petitioner present any other reason for violating the principle of stare decisis: it presents no evidence that either *Massiah* or *Moulton* is unworkable; no evidence that either decision has had a deleterious effect on the enforcement of this nation's criminal laws;[2] and no evidence that circumstances have changed since either decision was rendered such that the rulings are now obsolete or without justification. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. ____; 120 L.Ed.2d 674; 112 S.Ct. 2791 (1992) (discussing what the Court considers when reexamining prior decisions). As the Court has noted, "The careful observer will discern that any detours from the straight path of stare decisis in our past have occurred for articulable reasons, and only when the Court felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.' " *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)). Petitioner has presented no such articulable reasons, experience or newly ascertained facts.

II

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE CALIFORNIA SUPREME COURT'S UNANIMOUS DECISION THAT TRIAL COUNSEL'S DEFICIENT PERFORMANCE WAS PREJUDICIAL.

As discussed above, there was no direct evidence linking respondent to the murder and robbery for which he was convicted. Petitioner concedes that "the bulk of the evidence tending to

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[2]Petitioner's suggestion that the exclusionary rule of *Massiah* and *Moulton* gives defendants "a free shot at committing a new crime" is specious. As this Court expressly held in *Moulton*, evidence of any new crime, such as solicitation of the murder of a witness, would generally be admissible at the trial of the defendant for that new crime, because the Sixth Amendment right to counsel had not yet attached as to that crime. *Moulton*, 474 U.S. at 180 n. 16.

connect respondent to the charged murder was circumstantial." Moreover, the only circumstantial evidence cited by petitioner that even relates to *respondent* (as opposed to the victim) is the evidence (1) that respondent had allegedly remarked to a friend ten days before the murder that, on a prior occasion, he had been "tempted to knock Roy off and take the money"; (2) that a gas station attendant had identified a photograph of respondent as showing the person with the victim on the day before the murder (but, as noted above, the attendant failed to identify respondent at trial, identifying instead someone in the courtroom audience); and (3) that respondent's fingerprint was on the victim's van (along with 8 unidentified fingerprints) — a fact consistent with the evidence that respondent had frequently worked for and travelled with the victim.

By contrast, the inadmissible tape recordings were, as the California Supreme Court held, "highly incriminating, undoubtedly comprising the strongest evidence against petitioner." 3 Cal. 4th at 957. The tape recordings, unlike the testimony of the jailhouse informants who testified to purported statements by respondent, were not subject to impeachment. It cannot be disputed that the jurors were undoubtedly profoundly affected by hearing an actual recording of respondent apparently soliciting the murder of one of the prosecution's witnesses against him. As one member of the California Supreme Court put it at oral argument, this was "dynamite" evidence. The prosecutor considered it the most important evidence against respondent, and there was no reason for the California Supreme Court "[to] treat this evidence as any less 'crucial' than the prosecutor — and so presumably the jury — treated it." *See People v. Cruz*, 61 Cal.2d 861, 867-68 (1964).[3]

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[3]Although the tape recordings were unquestionably prejudicial evidence of respondent's consciousness of guilt, they may also have been materially false and misleading evidence. Respondent's documented history of mental and emotional impairments, the fact that the prosecution's informants received undisclosed benefits in exchange for their testimony, and the informants' false trial testimony that was condoned by the prosecution raise a substantial probability that the prosecution's

Accordingly, there is no reason for this Court to grant certiorari to review the California Supreme Court's unanimous, and unquestionably correct, decision that admission of the tape recordings and the testimony of the district attorney's investigator was prejudicial.

CONCLUSION

For the foregoing reasons, respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

Dated: March 3, 1993

Respectfully submitted,

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agents exploited respondent's impairments and thereby enticed him into soliciting the services of the purported assassin.